

No. 79-872

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1979

CAROL G. BAILEY, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT*

**MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION**

WADE H. MCCREE, JR.

Solicitor General

Department of Justice

Washington, D.C. 20530

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Petitioner commenced this action under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. 1346(b), 2671 *et seq.*, seeking damages from the United States as compensation for her husband's alleged wrongful death while serving as a sergeant in the Army National Guard. According to petitioner's complaint, the discharge from a machine gun mounted on top of a tank struck and killed her husband while he was on duty at Fort Drum, New York, on April 24, 1977. Petitioner asserted that this accident was the result of negligent maintenance of the tank and gun and inadequate training of the army personnel involved. Relying on *Feres v. United States*, 340 U.S. 135, 146 (1950), which held that servicemen cannot recover under the FTCA for injuries "incident to [their military] service," the district court dismissed the complaint (Pet. App. 2a-3a). The court of appeals summarily affirmed (*id.* at 1a).

Petitioner primarily contends (Pet. 5-7) that this Court should reconsider the *Feres* doctrine, because it is unfair to military personnel. As the Court explained in *Feres*, however, the FTCA was designed to compensate victims of governmental misconduct who lacked any other meaningful remedy, whereas Congress has otherwise provided "simple, certain, and uniform compensation for injuries or death of those in armed services." 340 U.S. at 144; see *id.* at 140, 145. In addition, the *Feres* doctrine reflects the special relationship of the soldier to the government and his superior officers and the realization that damage suits in this context would adversely affect military discipline. See 340 U.S. at 141-144; *United States v. Brown*, 348 U.S. 110, 112 (1954). See also *Brown v. Glines*, No. 78-1006 (Jan. 21, 1980), slip op. 6. The Court has recently re-examined and approved the *Feres* doctrine (*Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 669-674 (1977)) and there is no reason to do so again here.¹

Petitioner further suggests (Pet. 4-5) that the *Feres* doctrine is in any event inapplicable, because her husband was on "inactive duty for a weekend."² But petitioner's own complaint asserted that her husband was

¹Indeed, even if an FTCA suit were permitted here, petitioner's claim would seemingly be barred under New York law. See *Goldstein v. New York*, 281 N.Y. 396, 24 N.E. 2d 97 (1939) (no liability to state for injuries suffered incident to service in militia).

²We do not understand petitioner to contend that her husband's death did not occur "in the course of activity incident to service." 340 U.S. at 146. Such a contention would be frivolous. See, e.g., *Poe v. United States*, 577 F. 2d 752 (9th Cir.), cert. denied, 439 U.S. 1047 (1978); *Camassar v. United States*, 531 F. 2d 1149 (2d Cir. 1976); *Hass v. United States*, 518 F. 2d 1138 (4th Cir. 1975); *Herreman v. United States*, 476 F. 2d 234 (7th Cir. 1973). Rather, petitioner appears to argue that her husband was not a "serviceman" within the scope of the *Feres* doctrine.

killed while on military duty and during active military training. It is well settled that the *Feres* doctrine applies to National Guardsmen injured or killed during military training of any variety or duration. See, e.g., *Donham v. United States*, 395 F. Supp. 52, 53 (E.D. Mo. 1975), aff'd, 536 F. 2d 765 (8th Cir. 1976), aff'd *sub nom. Stencel Aero Engineering Corp. v. United States*, supra, 431 U.S. at 667-668 & n.1; *Herreman v. United States*, 476 F. 2d 234, 236 (7th Cir. 1973); *Layne v. United States*, 295 F. 2d 433, 435 (7th Cir. 1961), cert. denied, 368 U.S. 990 (1962); *Spain v. United States*, 452 F. Supp. 585 (D. Mont. 1978).³

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. McCREE, JR.
Solicitor General

JANUARY 1980

³Likewise, there is no doubt that decedent's family (including petitioner) is entitled to the full range of benefits available to a deceased serviceman's family. See, e.g., 32 U.S.C. 321; 38 U.S.C. 410-411; 38 U.S.C. 1700 *et seq.*; 10 U.S.C. 1481, 1482.